

NOT FOR PUBLICATION

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY**

	:	
ABRAXIS BIOSCIENCE, INC.,	:	
	:	
Plaintiff,	:	
v.	:	CIVIL ACTION NO. 07-1251 (JAP)
	:	
NAVINTA LLC,	:	
	:	
Defendant.	:	ORDER
	:	

Presently before the Court is a motion by Defendant Navinta LLC to dismiss Counts Two and Three from Plaintiff Abraxis BioScience, Inc.’s Complaint for lack of jurisdiction, pursuant to Federal Rule of Civil Procedure 12(b)(1). Plaintiff opposes this motion and also moves to amend its Complaint, pursuant to Federal Rule of Civil Procedure 15(a). Defendant opposes Plaintiff’s motion to amend its Complaint.

Having considered the parties’ written submissions and deciding the matter without oral argument pursuant to Federal Rule of Civil Procedure 78, the Court finds that it has jurisdiction over Plaintiff’s Counts Two and Three pursuant to 28 U.S.C. § 271(e)(2) and the Declaratory Judgment Act, 28 U.S.C. § 2201(a). 28 U.S.C. § 271(e)(2)(A) creates an artificial “act of infringement” that occurs upon the submission of “an application under section 505(j) of the Federal Food, Drug, and Cosmetic Act . . . for a drug claimed in a patent or the use of which is claimed in a patent[.]” 28 U.S.C. § 271(e)(2)(A); *Eli Lilly and Co. v. Medtronic, Inc.*, 496 U.S. 661, 678 (1990). Through that statute, Congress granted this Court jurisdiction over a hypothetical issue: if the defendant’s proposed generic drug was on the market, would it infringe

on the plaintiff's patent. *Warner-Lambert Co. v. Apotex Corp.*, 316 F.3d 1348, 1366 (Fed. Cir. 2003). Moreover, a justiciable declaratory judgment action, in the context of an alleged patent infringement claim, occurs where "the facts alleged, under all the circumstances, show that there is a substantial controversy, between the parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *MedImmune, Inc. v. Genentech, Inc.*, 127 S. Ct. 764, 771 (2007) (internal quotations omitted). Here, a consideration of "all the circumstances" as required by *MedImmune, supra*, indicates that the Court has jurisdiction over Plaintiff's Counts Two and Three. In addition, the Court finds that Plaintiff's sought amendments to the complaint would not be futile.

Accordingly, **IT IS**

ON THIS 9th day of October, 2007

ORDERED that Defendant's Motion to Dismiss Counts Two and Three of Plaintiff's Original Complaint is **DENIED**; and it is further

ORDERED that Plaintiff's Motion to Amend its Complaint is **GRANTED** pursuant to Federal Rule of Civil Procedure 15(a).

SO ORDERED.

/s/ Joel A. Pisano
JOEL A. PISANO, U.S.D.J.

Orig: Clerk
cc: All parties, File